



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer To:
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Re: Washington State University
NEW (NCE-FM), Chehalis, WA
BPED-19960325MD
Facility ID No. 81162

Shepherd Communications
NEW (NCE-FM), Littell, WA
BPED-19960619ME
Facility ID No. 82297

Group No. 960303

Dear Applicants:

We have before us Group 960303 – two mutually exclusive applications for permits to construct new noncommercial educational (“NCE”) FM stations serving different communities. In this situation, the rules require the Commission to make a threshold determination as to whether grant of either of the applications would further the fair, efficient, and equitable distribution of radio service among communities.¹ For the reasons stated below, we determine that the application of Washington State University (“WSU”) is entitled to a decisive Section 307(b) preference.

An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide a first or second reserved channel NCE aural service (in the aggregate) to at least ten percent of the population, provided that this constitutes at least 2,000 people, within the proposed station’s predicted 60 dBu

¹ See 47 U.S.C. § 307(b); 47 C.F.R. § 73.7002(a).

contour.² If more than one applicant in a mutually exclusive group qualifies for a preference, we compare first service population coverage totals.³ An applicant will receive a dispositive fair distribution preference by proposing to serve at least 5,000 more potential listeners than the next highest applicant's first service total, assuming that the applicant proposes first service to at least ten percent of the population.⁴ If no applicant is entitled to a first service preference, we consider combined first and second service population totals and apply the same 5,000 listener, and ten percent of the population thresholds.

In the present group, WSU would serve Chehalis, Washington, and Shepherd Communications ("Shepherd") would serve Littell, Washington. Each applicant claims that it would provide a new first or second NCE service to 10 percent of the population, and to at least 2,000 people, within its respective service area, and therefore, that it is eligible for a fair distribution preference.⁵ Each applicant also asserts that it is entitled to a first service preference.⁶ Neither applicant, however, will provide new first service to 5,000 more people than the other applicant. Therefore, neither applicant qualifies for a first service comparative preference. Accordingly, we consider whether WSU or Shepherd would provide combined first and second service to 5,000 more people than the other applicant. Based on the applicants' submissions and calculations, WSU would provide a first or second service to 38,961 people (19,338 first service plus 19,623 second service). Shepherd would provide a first or second service to 26,619 people (16,132 first service plus 10,487 second service). Accordingly, pursuant to Section 73.7004 of the Commission's Rules (the "Rules"), we identify WSU as the tentative selectee. Group 960303 thus will not proceed to a point hearing.⁷

² See 47 C.F.R. § 73.7002(b). With respect to population data, the Media Bureau directed applicants to use 2000 Census data, if available by June 4, 2001. See *Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applications Due by June 4, 2001*, Public Notice, 16 FCC Rcd 6893 (MB Mar. 22, 2001). The "fair distribution" analysis for applications filed under former licensing procedures is based on technical proposals pending on the "snap shot" date of June 4, 2001. Amendments after this date that diminish the applicant's comparative position are also considered. In this case, neither of the applicants has made such engineering changes. In addition, each applicant timely supplemented its application with a Section 307(b) showing; each purports to be based on 2000 Census data and an application "snap shot" date of June 4, 2001.

³ See 47 C.F.R. § 73.7002(b). See also *Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001*, Public Notice, 16 FCC Rcd 10892, 10893 (MB May 24, 2001).

⁴ *Id.*

⁵ WSU's 60 dBu contour encompasses 73,229 people. WSU's claimed aggregated first and second service is 38,961 people. Shepherd's 60 dBu contour encompasses 58,629 people. Shepherd's claimed aggregated first and second service is 26,619 people.

⁶ WSU claims to provide 19,338 people with new first service. Shepherd claims to provide 16,132 people with new first service.

⁷ See 47 C.F.R. § 73.7002(b). The Media Bureau has delegated authority to make Section 307(b) determinations in NCE cases. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000), partially reversed on other grounds, *NPR v. FCC*, 254 F.3d 226 (DC Cir. 2001) ("*NCE Order*"). See also 47 C.F.R. § 0.283. In the *NCE Order*, the Commission concluded that "[i]n examining the fair distribution issues, we will use the general process set forth in the Section of our Competitive Bidding proceeding that addressed Section 307(b) considerations for AM stations." See *NCE Order*, 15 FCC Rcd at 7397 (citing *Comparative Bidding for Commercial Broadcasting and Instructional Television Fixed Services*, First Report and Order, 13 FCC Rcd 15920 (1998) (delegating authority to the staff to conduct Section 307(b) analyses with respect to AM applications prior to conducting auctions of competing applications)). In contrast, the *NCE Order* noted that the point system analysis conducted when Section 307(b) is not determinative is considered a simplified "hearing" for purposes of 47 U.S.C. § 155(c)(1). See *NCE Order*, 15 FCC Rcd at 7420.

The Commission recently waived Section 73.3573 of the Rules to prevent dismissal of several tentative selectees that had been chosen pursuant to the NCE point system but that had experienced gradual, routine changes in over 50 percent of their governing boards over time.⁸ In so doing, the Commission directed the staff to grant waivers for similarly situated applicants selected pursuant to a fair distribution analysis. We find that a waiver is appropriate for WSU, the tentative selectee in the present group.⁹

Accordingly, IT IS ORDERED, That Washington State University is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Chehalis, Washington.

IT IS FURTHER ORDERED, That Section 73.3573 of the Commission's Rules, 47 C.F.R. § 73.3573, is waived with respect to the ownership change in the tentative selectee.

Petitions to deny the application of the tentative selectee are due within thirty (30) days of public notice announcing the tentative selection of the WSU application.¹⁰ If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we will, by public notice, dismiss the mutually exclusive application of Shepherd Communications (File No. BPED-19960619ME) and grant the application of Washington State University (File No. BPED-19960325MD).

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

⁸ See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, FCC 07-40, slip op. at paras. 59-60 (rel. March 27, 2007) ("NCE Omnibus Order"); 47 C.F.R. §§ 73.3573(a)(1), (b)(2), and (b)(3).

⁹ WSU is governed by a Board of Regents appointed by the Governor of the State of Washington. Pursuant to the ordinary, routine procedures for replacement of board members, WSU experienced a gradual change in the majority of its governing board over the many years since the filing of its application. See Amendment to File No. BPED-19960325MD (January 21, 2005). The ownership change does not appear to be an outgrowth of any party's desire to gain control over an NCE new station application. See *NCE Omnibus Order*, slip op. at para. 60.

¹⁰ See 47 C.F.R. § 73.7004. If any applicant previously raised issues against the tentative selectee, it must refile its objections within this thirty (30) day period.